Supreme Court, U.S.
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No. 96-1988

In The

Supreme Court of the United States

October Term, 1996

SEARS, ROEBUCK AND CO., SEARS MERCHANDISE GROUP,

Petitioners,

vs.

THOMAS LONG,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE CASE

Thomas Long joined Sears in 1964. He became one of the Company's top home improvement products and services ("HIPS") sales associates, winning many awards and honors, including salesman of the year. His annual earnings, based solely on commissions, approached $100,000. Mr. Long's job evaluations were outstanding. In fact, for the last year before termination, Mr. Long's overall rating was "above expectations".

In 1992, in response to poor HIPS earnings, Sears' senior management secretly planned to farm out most of the HIPS operation to newly created companies. Because successful commission sales associates could earn very high incomes there, the HIPS division was staffed by many long-term, older employees. Sears seemed concerned that discharging most of the graying HIPS workforce would result in costly age discrimination claims. Thus, the company decided to calm the targeted HIPS employees by telling them that transfers would be considered, and to offer severance pay to those who signed sweeping releases.

In January 1993, Sears announced that it was closing most of the HIPS business and said that HIPS employees who were not transferred to other Sears jobs by mid-April would be laid off. But Sears promised to make "every effort" to place employees elsewhere within the organization; long-term, qualified HIPS employees with satisfactory performance would be given preference. Mr. Long clearly satisfied this standard.

In early February 1993, Sears distributed a thirty-five page, single spaced Closed Unit/Reorganization Package ("Plan"), which offered HIPS employees up to 26 weeks of severance pay. The document proclaimed that the "the purpose of the plan is to grant limited salary continuation to assist employees

while they seek other employment." Consistent with this stated purpose, the Plan provided that if an employee later found new employment within Sears, severance benefits would end. Despite the stated purpose for severances, however, Sears refused to pay anything unless an employee signed a complete release of all claims against the company.[1]

Although it was seeking the release of age discrimination claims, Sears disregarded many of the requirements of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) ("OWBPA"). While declaring that employees had 45 days to decide, in early February Sears cautioned that "if you do not reach a decision by Friday, February 12, there will be a lapse in the payment of any severance due you and your benefits could be interrupted". And members of Sears' management pressured Mr. Long with threats that if he did not sign, no one else in his unit would get severance pay. They also led him to believe that signing was not significant because he was a prime candidate for transfer. Sears never gave Mr. Long a list containing the job titles and ages of persons in his unit who were not eligible or selected for the Plan. Nor did Sears give him the job titles and ages of persons in any other HIPS units who were eligible or selected for the Plan.[2] Finally, the release Sears demanded sought to extinguish discrimination claims that had not yet arisen.

Mr. Long is a high school graduate with no training or experience in legal matters. He did not understand either the Plan documents or the release. But he did know that he had

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1. Sears never told the HIPS employees that under another Sears policy, they were entitled to up to 10 weeks of severance pay even if they did not sign a release.

2. The only list Sears provided contained the ages of 14 sales associates in Mr. Long's unit. But there were at least four HIPS units in Philadelphia and Sears regularly transferred employees from one to another as it pleased.

dedicated 29 years, most of working career, to Sears and truly believed Sears' assurances that his award-winning performance and breadth of experience would yield another Sears position for him. Thus, Mr. Long delayed executing the release for many weeks. However, he eventually gave in to consistent pressure from his supervisor and warnings that if he did not sign, no one else in the HIPS unit would receive severance pay. Mr. Long signed a release dated March 18, 1993.

After signing, Mr. Long continued to seek one of the many Philadelphia jobs which Sears filled in the following weeks. Between March 18 and April 9, 1993, his last day at work, Sears gave almost a dozen younger, less qualified Philadelphia HIPS employees heating and air conditioning ("HVAC") positions. Having previously sold HVAC products for Sears, Mr. Long was more qualified for those positions than the successful candidates. Indeed, at least one of the transferred HIPS employees had absolutely no HVAC sales experience. Two others had worked for Sears less than one year. None of the transferees had annual sales that even approached Mr. Long's sales figures. All of the transferees, save one, were younger than Mr. Long. During the weeks between March 18 and April 9, Sears also filled about 50 other positions in the Philadelphia area for which Mr. Long was qualified and interested. About three-quarters of those Sears hired were under 40 years of age.

After April 9, 1993, Mr. Long continued to believe that Sears would find a place for him. By summer, however, he began to hear reports that Sears was continuing to hire young, less-qualified employees from the Philadelphia area. Anger and suspicion of age bias replaced Mr. Long's deep faith in Sears. Thus, in July 1993 he filed administrative charges of discrimination, including one under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.* ("ADEA"). In due course, he filed suit. Mr. Long did not return severance

pay before filing his charges of discrimination or before docketing his complaint. He did agree in pretrial submissions that severance pay should be credited against damages awarded.

On March 1, 1996, the District Court granted summary judgment for Sears on all of Mr. Long's federal and state claims on the theory that by not returning severance pay, Mr. Long had ratified the release (which the Court assumed violated the OWBPA).

Mr. Long appealed to the Third Circuit contending, *inter alia*, that violations of the OWBPA and the ADEA cannot be overcome by the common law doctrine of ratification. The Court of Appeals ruled that, as a matter of law, a release which does not comply in all respects with the OWBPA cannot be subject to ratification. The court refused Sears' request for reconsideration.

REASONS FOR DENYING THE WRIT

I.

THERE IS A SPLIT IN THE CIRCUITS AS TO WHETHER A RELEASE WHICH VIOLATES THE OWBPA CAN BE RATIFIED, BUT INDEPENDENT REVIEW OF THIS CASE IS UNNECESSARY IN LIGHT OF THIS COURT'S DECISION TO GRANT CERTIORARI IN *OUBRE V. ENTERGY OPERATIONS, INC.*

The Petitioners correctly assert that there is a split among the circuits on the issue of whether releases which violate the OWBPA are subject to ratification. The Third Circuit in this case and the Seventh Circuit in *Oberg v. Allied Van Lines*, 11 F.3d 679 (7th Cir. 1993), held that a release which violates the

OWBPA cannot be ratified. Decisions of the Fifth and Fourth Circuits have held that OWBPA defective waivers are merely voidable and can be ratified by an employee's retention of severance benefits. *See Wamsley v. Champion Refining and Chemicals, Inc.*, 11 F.3d 354 (5th Cir. 1995) and *Blistein v. St. John's College*, 74 F.3d 1459 (4th Cir. 1996).

This Court has recently granted certiorari to review a Fifth Circuit OWBPA ruling adhering to *Wamsley*. *Oubre v. Entergy Operations, Inc*, __ U.S. __, 117 S. Ct. 1466, 65 U.S.L.W. 3711 (Apr. 2, 1997). *Oubre* and the present case present the same issue: When an employer disregards OWBPA requirements, does an employee's failure to tender back sums received in conjunction with a separation validate the flawed release?

The Petitioners' reasons for independent review of *Long* are not persuasive. First, *Oubre* has not been settled or become moot. Second, while it is true that *Oubre* involves a single termination and *Long* involves a group termination, the legal issue in both cases is the same. Lastly, the fact that Mr. Long's complaint also asserted non-ADEA claims does not change the OWBPA issue.

II.

THE THIRD CIRCUIT PROPERLY APPLIED PRECEDENT AND CORRECTLY DECIDED THAT THE COMMON LAW DOCTRINE OF RATIFICATION CANNOT CURE AN OWBPA DEFECTIVE RELEASE.

In deciding that an OWBPA defective release cannot be made effective through ratification, the Third Circuit applied this Court's analysis in *Hogue v. Southern R. Co.*, 390 U.S. 516 (1968). In *Hogue*, a worker who had sustained a severe workplace injury sought damages under the Federal Employer's

Liability Act ("FELA") despite having previously signed a release. This Court ruled that because the FELA is a remedial federal statute, the common law doctrine of ratification did not apply.

In *Long*, the Third Circuit properly viewed the ADEA as a federal remedial statute and, consistent with *Hogue*, concluded that the ratification doctrine does not apply to ADEA releases.

III.

THE COURTS BELOW NEVER DECIDED WHETHER SEARS' RELEASE COVERED FUTURE CLAIMS AND THIS COURT SHOULD NOT DO SO NOW.

The Petitioners urge this Court to grant certiorari to address whether Sears' release impermissibly includes future claims. Several reasons counsel against considering this issue. First, the District Court never determined whether the release at issue waived future claims in violation of the OWBPA. Supp. App. 9. The Third Circuit also declined to consider this issue, believing its analysis would be premature and that the District Court first needed to address the merits of this issue. App. 8, n. 6. This question is no riper today.

Second, there is no statutory ambiguity to justify early Supreme Court review of this issue. The OWBPA explicitly provides that a release cannot be "knowing and voluntary" if it purports to "waive rights or claims that may arise after the date the waiver is executed". 29 U.S.C. § 626(f)(1)(C). The legislative history confirms that the OWBPA bars a waiver of future employment decisions:

> Such a pre-emptive waiver also may preclude the employee from asserting claims that arise

> out of subsequent discriminatory conduct by the employer, e.g., hiring younger workers to replace the terminated older workers. These waivers are both unfair and inconsistent with the intent of the ADEA.

S. Rep. No. 79 at 9.

The Petitioners complain that enforcing the OWBPA's prohibition against the release of future claims would require employers to delay obtaining releases until "after the termination had actually occurred," and thus urges an interpretation that would permit employers to obtain a release of all employment claims merely upon notification of possible termination in the future. As the facts in this case show, such a reading would create much mischief.

Between January, when Sears announced the potential terminations, and April 9, Mr. Long's last day of work, Sears made many employment decisions in Philadelphia which Mr. Long believes discriminated against him. Over 60 of these discriminatory employment decisions took place "after the date the waiver was executed," and thus could not legally be released on March 18.[3] Sears' interpretation, based on employer convenience, would rewrite the law.

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3. Contrary to the Petitioners' assertion, *Delaware State College v. Ricks*, 449 U.S. 250 (1980), is not on point. It is not an OWBPA case. *Ricks* involved the question of when to begin the statute of limitations countdown on a Title VII action. The Title VII statute of limitations is designed to protect employers from stale claims. *Ricks*, at 256-57. On the other hand, the OWBPA serves to protect employees from overreaching employers.

CONCLUSION

For all of these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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